(5)

No. 84-16

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. McCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,

Appellants,

v.

WESTERN OIL & GAS ASSOCIATION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE FOR THE CITIES OF SANTA MONICA, CULVER CITY, TORRANCE AND HUNTINGTON BEACH

IN SUPPORT OF REVERSAL

BERT GLENNON, JR.
City Attorney
Culver City, California

STANLEY E. REMELMEYER
City Attorney
Torrance, California

GAIL HUTTON
City Attorney
Huntington Beach, California

ROBERT M. MYERS
City Attorney
Counsel of Record

STEPHEN S. STARK
Assistant City Attorney

KARL M. MANHEIM
Deputy City Attorney
1685 Main Street
Santa Monica, California 90401
Telephone: (213) 458-8336

Attorneys for Amici Curiae

Westside Law Publishers Los Angeles, California (213) 477-0491

27PP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

No. 84-16

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. McCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,

Appellants,

v.

WESTERN OIL & GAS ASSOCIATION, et al.,

Appellees.

BRIEF OF AMICI CURIAE FOR THE CITIES OF SANTA MONICA, CULVER CITY, TORRANCE AND HUNTINGTON BEACH

This brief is filed pursuant to Rule 36.4 of the Rules of the Supreme Court.

INTEREST OF AMICI

Amicus curiae City of Santa Monica ("City") is a political subdivision of the State of California. The City, under a charter authorized by the California Constitution, is a body corporate and politic, exercising governmental powers over matters within its jurisdiction and proprietary powers over property which it holds.

There is now pending in the United States District Court for the Central District of California an action entitled *Shell Oil Company v. City of Santa Monica*, Case No. CV 82-2362-RJK. This action would compel the City to grant a franchise to Shell to operate a crude oil pipeline beneath City streets on terms favored by Shell.[1] Shell claims a right of action directly under the Commerce Clause to compel the franchise on economic and safety terms that the City has determined to be inimical to the public health and welfare. The decision in the case at bar could directly affect the decision in *Shell v. City*; indeed, a tentative decision in the City's favor on its motion for judgment on the pleadings on Commerce Clause issues was reversed by the District Court in light of the Ninth Circuit opinion below.

This brief addresses two related issues of fundamental concern to the City and to municipalities generally.[2] First is the principle that the State in leasing land for marine terminal locations is acting as a "market participant" and not as a market regulator subject to Commerce Clause scrutiny. Second is the concept that the negative implications of the Commerce Claus should not be interpreted to compel affirmative action by a State in furtherance of commerce.

The California cities of Culver City, Torrance, and Huntington Beach, each of which grants subsurface pipeline rights to oil companies, join Santa Monica in this amicus brief in support of appellants.

---

[1]A previous 40-year franchise agreement between the City and Shell expired in 1981.

[2]Appellees have obtained oil pipeline franchises from scores of California cities which are similarly situated to Santa Monica. *See. Gulf Oil Corp. v. City of Huntington Beach*, Case No. CV 80-5709-RMT (C.D. Cal) (settled and dismissed). Many of those franchises are up for or nearing renewal.

SUMMARY OF ARGUMENT

1. The State, in leasing land for marine terminals, is a market participant and not a regulator. It does not enjoy a monopoly over suitable sites; the opinion below reached its conclusion of monopoly status by defining the relevant market conveniently to the result reached. Further, even if the State has a monopoly of the relevant market, its activites are distinct from regulatory and taxing functions subject to the Commerce Clause, although other constitutional and legislative constraints may apply. The opinion below contradicts recent decisions of this Court regarding the market participant doctrine and ignores their salutary principles.

2. The negative implications of the Commerce Clause have been taken to preclude states from interfering with interstate market forces by burdensome taxation or regulation. They have not heretofore been construed to require a state to enter into a contract with a private party on terms said to promote commerce. A state has no obligation to convey an interest in its property whenever an entity invokes the Commerce Clause to facilitate its interstate or foreign operations. The reach of the "great silences" of the Commerce Clause should not be extended to require judicial supervision over the terms of contracts regarding government property; the concept is a radical break from precedent and portends far-ranging pernicious effects on the States and the courts.

ARGUMENT

Appellees, several oil companies involved in interstate and foreign commerce and their trade association ("oil companies"), lease land from appellant, State Lands Commission ("State"), for marine terminal sites adjacent to their refinery facilities. The relationship between the oil companies and the state is of a traditional contractual nature. The oil companies object to the State's rental regulation authorizing a volumetric form of rent. They claim that several constitutional provisions prohibit this rental formula and that they are entitled to enter into and renew leases using a rental mode more favorable to them. In essence, the oil companies invoke the Commerce Clause and related constitutional provisions as super bargaining tools to (1) ensure lease renewal and (2) set lease terms. This perverts the meaning and purpose of the Commerce Clause.

The issue would be entirely different were Congress to assume the plenary authority granted it by the Constitution to legislate in this area, as by prescribing locations for marine terminals and pipeline routes, or setting rents. Yet, no such legislation is invoked.[3] Rather, it is only the "negative implications" of the Commerce Clause which the oil companies invoke to require the State to enter and renew their leases for a fee equivalent to the State's cost.

---

[3]Indeed, Congress has already considered and rejected federal authority regarding pipeline routing. *See* 49 U.S.C. §2001(4) (Hazardous Liquid Pipeline Safety Act) ("this chapter does not authorize the Secretary [of Transportation] to prescribe the location or the routing of any pipeline facility").

I

THE COMMERCE CLAUSE DOES NOT RESTRAIN THE EXERCISE OF STATE PROPRIETARY POWERS

The touchstone of Commerce Clause scrutiny is sovereign behavior by the State. If the State acts to impede foreign or interstate commerce, the Clause prohibits discriminatory or impermissible burdens. The principle is rooted in basic tenets of federalism and separation of powers with two major qualifiers: (1) There must be state action to warrant judicial intervention directly under the Commerce Clause; (2) The state action must be sovereign in nature, and not the simple disposition of the state's property.

A. The Market Participant Doctrine.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this Court established the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As said in *Reeves* and re-affirmed in *White v. Massachusetts Council of Construction Employees*, ___ U.S.___ 75 L.Ed.2d 1 (1983),

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the nation marketplace. [citation omitted] There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. *Reeves v. Stake*, 447 U.S. at 436-437; quoted in

> *White v. Massachusetts Council of Construction Employees*, 75 L.Ed.2d 1 at 5-6.

The market participant doctrine recognizes that, in various contexts, states may be indistinguishable from private parties competing for the offering or purchase of goods, rights and services. Thus, in *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794 (1976), this Court reversed a three-judge District Court's use of the traditional Commerce Clause balancing test in analyzing a state scheme to subsidize the purchase of abandoned automobiles.

> This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potenially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned. *Id.* at 805.

In *Reeves*, this Court also noted that considerations of state sovereignty cautioned that the Commerce Clause should be applied with restraint.

> [W]hen acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, . . . the adjustment of interests in this context is a task better suited for Congress than this Court. 447 U.S. at 439 (citations omitted).

See also Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 896 (1961) (a governmental entity enjoys greater authority as a proprietor than it does simply as a law maker); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases"); *Fidelity Guarantee Mortgage Corp. v. Connecticut*, 532 F. Supp. 81, 84-85 (D.Conn.1982) (Commerce Clause analysis is not necessary because "the activity challenged . . . is not state regulation of interstate commerce, but rather state participation in the market place . . . . State proprietary activities . . . are subject to the same governmental restrictions as private parties").

This Court has also recognized proprietary-regulatory distinctions in the operation of municipal transportation facilities. Thus, in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973), the Court noted that while a municipality might not regulate air traffic pursuant to its police power, as proprietor of an airport, it was not subject to the same limitations. *See also South Carolina v. Barnwell Bros.*, 303 U.S. 177, 185 (1938) ("notwithstanding the commerce clause . . . regulation [of matters of local concern] in the absence of Congressional action has for the most part been left to the states"); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) (the "power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation").

Most recently, in *South-Central Timber Development, Inc. v. Wunnicke*, ___ U.S. ___, 81 L. Ed. 2d 71 (1984), this Court, while holding that a "downstream regulation" requiring timber from state lands to be

processed within the state prior to export violated the Commerce Clause, reaffirmed the basic principle of the market participant doctrine developed in *Alexandria Scrap, Reeves,* and *White.* "If a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limit on its activities". *Id.* at 80.

Thus, the market participant doctrine as developed over recent years is an articulation of a basic constitutional tenet — proprietary activities of state and local government do not have the potential for disrupting national commerce or "Balkanizing" the economy. *Cf. Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979)

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *Gibbons v. Ogden,* 9 Wheat. 1, 195 (1824).

B. The State Is A Participant In The Market For Suitable Land.

As a basic proposition, rent for the use of land is neither a tax nor a downstream regulation. The State is not requiring payment from anyone with whom it does not directly contract. Leases of government property seems to fit squarely within the concept of the State's "own economic action" found exempt from Commerce Clause scrutiny in *White v. Massachusetts Council of Construction Employees,* ___ U.S. ___, 75 L. Ed. 2d 1 (1983).

> [T]he distinction between participation and regulation rests on core notions of state sovereignty,

> coupled with the traditional rights of private traders to determine the identities of their bargaining partners free from governmental interference. The legitimacy of a claim to the market participant exemption thus should turn primarily on *whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt,* analogous to the accustomed right of merchants in the private sector, *to govern the State's own economic conduct and to determine the parties with whom it will deal. Id.* at 13 (Blackmun, J., dissenting) (citations omitted, emphasis added).

The court below rejected market participant exemption because of the State's perceived "monopolistic position over the sites used by the oil companies." Jurisdictional Statement Appendix, p. A-6. This holding is premised on both factual and analytical errors. First, with respect to coastal land available for marine terminal sites, the State does not have a monopoly. Second, even if a monopoly as to particular tracts of land is assumed, the State is promoting its own economic interests and not regulating downstream markets subject to Commerce Clause scrutiny.[4] The character of the state action should dictate whether the State is participant or regulator; in this case the State action is proprietary in nature, concerning only contracts for the use of State land by particular private companies.

---

[4]There are constraints such as the antitrust laws on monopoly excesses. As this court recognized in *Jefferson County Pharmaceutical Ass'n Inc. v. Abbott Labs,* ____ U.S. ____ 74 L.Ed 2d 882, 888 (1983), if the State is a monopolist in a proprietary capacity, it too may be subject to antitrust limitations. Thus the Court of Appeals' latent concern that the State might abuse a monopoly position without safeguards is illusory.

1. The State Does Not Have A Monopoly.

Implicit in the lower court's conclusion of monopoly status is the premise that the State is exercising the sort of regulatory powers requiring Commerce Clause scrutiny. But the court fails to distinguish between a market participant who may enjoy monopoly status in a narrowly defined market and true governmental regulation that affects all traders within the jurisdiction. Acceptance of the court's reasoning, coupled with a view "that the particular tract involved in each purchase or lease itself constitutes the relevant market" (*Northern Pacific Ry. v. U.S.* 356 U.S. 1, 18 (1958) (Harlan, J. dissenting)), could lead to untoward results. Thus, each landowner becomes a mini-monopolist subject to Commerce Clause scrutiny even without Congressional action. This Court should be wary of adopting a rule defining markets so narrowly as to convert every property holder into a monopolist and every contract condition into a "downstream regulation." The relevant market in this case is land suitable for marine terminals, not the particular parcels in question.

Market definition is critical to monopoly determination. In *South-Central Timber Development, Inc. v. Wunnicke,* ___ U.S. ___ 81 L. Ed. 2d 71 (1984), this Court cautioned against defining a market so broadly that it embraced both a market in which the state participated (raw timber) and a market in which the state was not participating (processed timber). The Court agreed with the timber company that although Alaska is a participant in the raw timber market, it was using its leverage in that market to exert a regulatory effect in the timber processing market, in which it is not a participant. *Id.* at 83. Alaska's "primary manufacture" regulation was motivated by its concerns as *parens patriae* over the general welfare and not by the business interests of the State as an economic

entity.[5] Thus, the conditions placed on timber buyers were held to be "downstream regulations" on timber processing not exempt from Commerce Clause scrutiny. This key factor is not present here. California participates only in the leasing of its land; it is not imposing any conditions on the recovery, transportation or refining of petroleum products. The State is acting in a classic business capacity, attempting only to obtain a fair rental value for its own property.

The oil companies seem to believe that interstate commerce in crude oil is absolutely dependent upon use of their existing refineries, terminals and pipelines. Thus, they see expedient access to those facilities as the *sine qua non* for commerce. They fail to appreciate, however, that the notion of commerce embodied in the Commerce Clause is not defined in terms of particular firms, facilities, or even marketing systems. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127-128 (1978), (the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations).

While the oil companies may desire to use State lands to reach these particular refineries, they do not have to do so in order to engage in commerce in California. Since the oil companies may obtain property rights from other public

---

[5]Moreover, the character of the restraint in *Wunnicke* is significant. The Court referred to the "protectionist nature of Alaska's local-processing requirement" and cited a line of cases "view[ing] with suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." 81 L.Ed.2d 71, 84-85 citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928). Thus, the cases and commentators place emphasis on the "reasons for which the regulations were imposed." Tribe, *American Constitutional Law*, 328 (1977).

and private land holders without disrupting interstate commerce, the State is no more of a monopolist than is any landlord to its tenant. The relevant market for transportation facilities and corridors is the entire coastal strip, because access to California and its markets may be gained from any number of "competitors."[6] The issue is one of commercial convenience rather than practical necessity.

It may be an economic burden on the oil companies to obtain new access to existing refineries (should they not renew their ground leases for marine terminal sites), but that is not a burden on "commerce".

> [W]e are not confronted with a situation in which legislation has reduced the effectiveness of a means of transportation itself. In this context the ordinance is not a burden on interstate commerce, but is merely a 'burden' on a company which happens to have interstate distribution facilities. The effect of the ordinance is that the particular interstate systems of Procter and Gamble and other detergent companies before the passage of the ordinance can no longer be used . . . While this factor might necessitate a change in certain production facilities, it does not rise to the level of an unconstitutional burden on interstate commerce. *Procter & Gamble Co. v. City of Chicago,* 509 F.2d 69, 77 (7th Cir. 1975) *cert. denied,* 421 U.S. 978.

---

[6]Pipeline access to refineries may be had through land owned by others including upland property. The Shell pipeline running through Santa Monica is an example of available alternatives. Offshore crude oil enters California at Ventura, some 80 miles north of Shell's Wilmington refinery, and then travels south via pipeline through coastal and inland cities. The precise route chosen may be dependent upon a number of factors. But clearly no single landowner (public or private) monopolizes access to California markets or this particular refinery.

The potential relocation of marine terminal facilities is part of the financial calculus that went into the oil companies' initial siting decisions[7] and one that will enter their decision to renew or seek reissuance of their State leases (as it would in the case of a private lease). If the State has become a monopolist simply by virtue of having granted the leases in the first place, then the market participant doctrine is unavailable after its first use in every context.

If the oil companies are correct that the present location of their facilities conferes monopoly power on the State and requires lease renewal, then their initial leases can never legally terminate. Accordingly, whether the State knew it or not, it conferred perpetual (fee) interests in public property despite the contractual terms. This proposition is untenable, seemingly resulting in a gift of public property for private purposes. Even a public utility has no legal right to maintain its utility lines after expiration of its leases. *Detroit v. Detroit United Railway Co.*, 172 Mich. 136, 137 N.W. 645, (1912), *aff'd* 229 U.S. 39 (1913).

The oil companies' argument is facile and insidious: once they obtain rights in public property, the lease terms become irrelevant. By the force of the Commerce Clause the leases must be renewed with a rental set at the government's actual cost. Fortunately, nothing in the Constitution requires state and local government to so cede public property to private companies.

2. The State Is Not Regulating.

The State's rental formula is set out by adminstrative regulation. But that denomination does not mean that the

[7]The duration of the lease must surely have been negotiated so as to enable amortization of capital in the event no new lease was issued at the expiration of the current term. It is the same concern that every commercial tenant has in bargaining for lease terms long enough to amortize investment and moving costs.

state activity constitutes "regulation" for Commerce Clause purposes.[8] A critical factor in determining application of the market participant doctrine is whether interstate traders must subject themselves to state authority as an incident to engaging in commerce. Thus, if the oil companies were unable to bring crude oil into California unless they submitted to State requirements, the State's impact would go beyond an immediate contractual relationship with the oil companies. In that case the State's influence would be more far reaching; it would inhibit the oil companies' engagement in commerce entirely. Then, traditional Commerce Clause analysis would be appropriate. *South-Central Timber Development, Inc. v. Wunnicke* ___ U.S. ___, 81 L.Ed. 2d 71 (1984).

What makes a particular exercise of authority regulatory in nature is its pervasive effect on interstate traders. Only when the state acts in its sovereign capacity is it able to affect all traders in a particular commodity. Thus, whether a state is regulating or participating may not turn on traditional concepts of fee ownership in land. Rather, it is the way the state uses its ownership interest vis a vis commerce that prompts Commerce Clause analysis.

The distinction between participating in and regulating the market is well illustrated by comparing the instant case to *Haskell v. Cowham,* 187 F. 403 (8th Cir. 1911), and *West v. Kansas Natural Gas Co.,* 221 U.S. 229 (1911). Those cases involved Oklahoma statutes which prevented the exportation of all natural gas. The vehicle Oklahoma chose for its economic protectionism was legislation which prohibited construction of pipelines under or across

---

[8] "Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 444 (1960) (citations omitted).

state highways. Since such highways formed a perimeter boundary, and pipeline was the only means of transportation available to the industry, local producers were effectively prohibited from marketing their product in other states. The Oklahoma statute made interstate commerce "impossible."

> Interstate commerce in natural gas is absolutely prevented, — prohibited . . . and to prohibit interstate commerce is more than to indirectly affect it. Every provision of the statute is directed to such result. . . .
>
> The statute presents no embarassing questions of interpretation. It was manifestly enacted in the confident belief that the state had the power to confine commerce in natural gas between points within the state, and all of the rights conferred on domestic corporations, all of the rights denied to foreign corporations, were means to such ends. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 249-50 (1911).

The facts in the instant case are a far cry from the economic protectionism cases which have merited strict application of Commerce Clause safeguards. Instead here the State is acting precisely as one would expect of a market participant—seeking fair rental value for its property. Its challenged rental mode is neither designed to discriminate against interstate commerce, nor does it have that effect. Most importantly for this analysis, the State's actions go no further than the immediate lease arrangements with the oil companies. They have no "regulatory" impact on downstream relationships, nor do they affect the oil companies' other lease arrangements with landholders within California. The rental charged is a direct incident of the property interest obtained by the oil companies.

In the instant case no discrimination in favor of local oil companies (or similar enterprises) appears. "Economic protectionism" is simply not an issue here.

> Especially when such measures do not discriminate on their face between in-state and out-of-state enterprises, not even a heavy burden on out-of-state enterprises is likely to result in their invalidation. . . . Tribe, *American Constitutional Law,* 329.

See also Sporhase v. Nebraska, 458 U.S. 941, 956 (1982) ("for Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulations on the other").

3. The State Is Not Taxing Commerce

Taxes are analogous to regulations in their impact on commerce. Consequently, this Court has employed the same standards and terminology in determining Commerce Clause challenges to state taxes. *See, e.g., Galveston, H. & S.A.R. Co. v. Texas,* 210 U.S. 217 (1908). An important common thread is that taxation, like regulation, is an act of the state as sovereign. *Case of the State Freight Tax,* 15 Wall. 232, 278 (1873).

This Court has long been concerned with taxes which interfere with the right to interstate travel and commerce. *Crandall v. Nevada,* 6 Wall. 35 (1867). The basic concern is that, unless the taxed activity is discretely local, the interstate activity could be subject to multiple taxation, possibly destroying it. *Id.* at 46. Without the protection of the Commerce Clause in such cases, interstate commerce "would bear cumulative burdens not imposed on local commerce." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 256 (1938). It is the extraterritorial effect of taxes and regulations which

violates the Commerce Clause. Taxes attributable to local aspects of interstate commerce, however, are constitutional. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

Despite these principles, the oil companies argue that rent for the use of State land is a tax. By doing so, the oil companies hope to limit the "tax" to merely offset the State's cost of providing land. They are wrong on two accounts. First, a charge for the use of land is not a tax. It is a rental for the private exclusive use of State land.[9] The Commerce Clause does not prohibit the State from generating revenue through the leasing of its own property. Second, even construed as a tax, such fees are directly attributable to exclusively local aspects of commerce. No other governmental entity will "tax" the oil companies for their leases of State lands. The State does not "tax" the oil companies for their leases with other parties.

Rent for an exclusive right for the permanent private use of public property is neither a tax nor a toll. This principle is best understood by those authorities which hold that a lessee with a possessory interest in State property must pay both a rental therefor *and* a property tax for the possessory interest. *See* California Revenue & Taxation Code Section 401; *Forster Shipbuilding Co. v. County of Los Angeles,* 54 Cal.2d 450, 353 P.2d 736, 6 Cal.Rptr. 24 (1960); *Texas Company v. County of Los Angeles,* 52 Cal.2d 55, 338 P.2d 440 (1959).

Since the rental is not a tax, cases such as *Evansville-Vanderburgh Airport Authority v. Delta Airlines,* 405 U.S. 707 (1972), are not authority for limiting the amount

---

[9]Not all charges imposed by government constitute a tax. For instance, a charge paid by a franchisee is part of the consideration it undertakes to pay for the privilege of using public property. *Case of the State Freight Tax,* 15 Wall. 232, 278 (1873).

of rental charged. In *Evansville,* this Court upheld fair non-discriminatory taxes on passengers using interstate transportation facilities. The Court reaffirmed *Hendrick v. Maryland,* 235 U.S. 610 (1915), holding:

> Where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Evansville* at 405 U.S. 624.

Further, there is a material distinction between the passengers embarking on interstate travel in *Evansville* and the oil companies' use of public lands. In the former case, the charge is levied directly on the act of interstate commerce — flying out of State. While in this case, the oil companies are obtaining possessory interests in property, the rental for which is measured in a customary volumetric formula. Accordingly, there is no suggestion in *Evansville* that the airlines or other airport tenants were entitled to lease their business sites from the municipal proprietor at less than fair market rental.[10] Similarly, there is nothing in other taxation cases which limits rentals for the lease of State property to an amount that merely compensates the governmental entity for costs incurred.

---

[10] "In determining the . . . rent it will charge for the use of its properties, a municipal airport authority is acting as the proprietor of the property, and not as a regulatory agency. In making such determinations, the authority is subject only to limitations imposed upon it by statute or by contractual obligations assumed by it." 3 McQuillin, *The Law of Municipal Corporations* Section 11.03a, p. 6.

II
THE COMMERCE CLAUSE DOES NOT MANDATE AFFIRMATIVE STATE ACTION

Where the State sees no public interest in engaging in an activity, there is no reason for it to yield an interest in its land when all it can do is recoup its costs. Thus, the oil companies' argument that the leases cannot constitutionally generate revenue for the State necessarily carries the corollary claim that the State must renew or reissue the expired leases even if it chooses not to.[11] This takes the Commerce Clause in a direction never envisioned by the framers.

Starting with *Cooley v. Board of Wardens,* 12 How. 299 (1852), this Court has consistently interpreted the Commerce Clause as a "self-executing limitation on the power of the States to *enact laws* imposing substantial burdens on . . . . commerce." *South-Central Timber Development, Inc. v. Wunnicke,* ____ U.S. ____, 81 L.Ed 71, 76 (1984) (emphasis added). This "negative implication" stems directly from the framers purpose. *See* Federalist No. 22 (the grant of power to Congress was to suppress the "interfering and unneighborly regulations of some States").

However, nowhere is there any indication that the Commerce Clause, by its own force, was intended to compel a state to take affirmative action in support of commerce. Thus, in the absence of any Congressional expression in this matter, it is only by interpreting in a radically new manner the "great silences of the Consti-

---

[11] Although the State has manifested no interest not to reissue the leases, amicus Santa Monica has determined that renewal of the expired Shell franchise (on the terms Shell claims are constitutionally required) is not in the public interest and is not warranted. Thus, whether Santa Monica must renew the franchise at all is a threshold issue in *Shell v. City of Santa Monica.*

tution," *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S 525, 535 (1949), that the oil companies can force lease renewal and terms on the State.[12]

As with Fourteenth Amendment analyses, state inaction is not state action. *See, e.g., Evans v. Abney,* 396 U.S. 435 (1970). For the most part, the courts do not hold governments accountable for their "failure to act." Tribe, *American Constitutional Law,* at 1150.

> [T]he state action requirement reinforces the two chief principles of division which organize the governmental structure that the Constitution creates: federalism and the separation of powers. *Id.* at 1149.

If state inaction is sufficient to trigger court-supervised lease terms, the oil companies will have employed the judiciary to reach public utility status without legislative authorization. Extension of the analysis employed below portends great mischief for governmental entities seeking to derive reasonable value from proprietary assets and enterprises. The historic allocation of powers between governments and among governmental branches would, in the view of amici cities, be altered at the very roots of our federal system.

The oil companies intend to use the Commerce Clause as a sword to compel affirmative state action, rather than as a shield against burdensome and discriminatory regulation. Such a course, tantamount to giving private parties the right of eminent domain in public properties, stands the Constitution on its head.

---

[12]Of course, once a state opens an avenue of commerce, it may not discriminate against or impermissibly burden commerce. *Santa Monica Airport Ass'n v. City of Santa Monica,* 479 F.Supp. 927, (C.D. Cal. 1979), *affirmed* 659 F.2d 100 (9th Cir. 1981). However, nothing in the Commerce Clause requires a state to provide a transportation facility or other instrument of commerce in the first place.

CONCLUSION

The Constitution was never intended to compel a State to rent its land at cost to private parties pursuing business gain. Congress has never directed or authorized this sort of "reverse eminent domain." This Court should repair the fabric of the Commerce Clause and restore to the State its basic power to use its own property economically for the general public good. The decision below should be reversed.

November 14, 1984

Respectfully submitted,

ROBERT H. MYERS
City Attorney
Counsel of Record
STEPHEN S. STARK
Assistant City Attorney
KARL M. MANHEIM
Deputy City Attorney
Attorneys for Amici Curiae

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 13, 1984, I served the within *Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

Philip Verleger
McCutchen, Black, Verleger
& Shea
600 Wilshire Boulevard
Los Angeles, California 90017

John K. Van de Kamp
Attorney General of the
State of California
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
6000 State Building
San Francisco, California 94102

Gail Hutton
City Attorney
William S. Amsbary
Assistant City Attorney
Arthur De La Loza
Deputy City Attorney
2000 Main Street
Box 190
Huntington Beach,
California 92648

Stanley E. Remelmeyer
City Attorney
3031 Torrance Boulevard
Third Floor
Torrance, California 90503

Bert Glennon, Jr.
City Attorney
9770 Culver Boulevard
Culver City, California 90230

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)